In the

Supreme Court of the United States,

October Term, 1898.

THE TELLURIDE POWER TRANSMISSION CO. and K. T. KEENE, Plaintiffs in Error,

v.

THE RIO GRANDE WESTERN RAILWAY CO.

No. 284

MOTION TO DISMISS OR AFFIRM.
NOTICE OF MOTION.
PROOF OF SERVICE.
BRIEF IN SUPPORT OF THE MOTION.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for the Defendant in Error for the purposes of this Motion.

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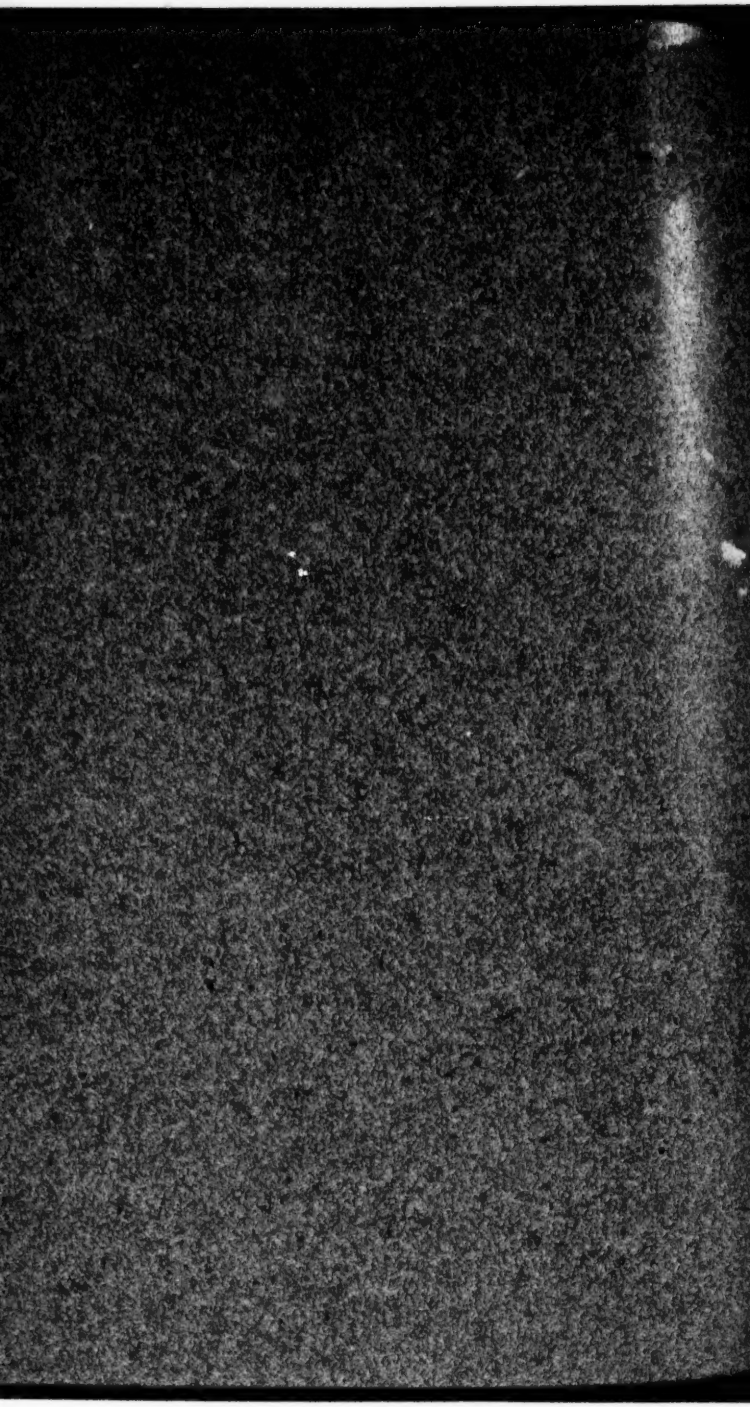

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

THE TELLURIDE POWER TRANSMISSION CO. AND L. L. NUNN,
PLAINTIFFS IN ERROR,

v.

THE RIO GRANDE WESTERN RAILWAY CO.

No. 292.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, appearing by its counsel in that behalf, and moves the court to dismiss the writ of error in the above cause for want of jurisdiction: because the judgment or decree from which said writ purports to be taken is the judgment or decree of the highest court of a State, to wit, the supreme court of the State of Utah, and no decision was had in the suit where was drawn in question the validity of a treaty or statute of or authority exercised under the United States and where the decision was against the validity of such treaty, statute, or authority; nor any decision where was drawn in question the validity of a statute of or authority exercised under any State on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States and where the decision was in favor of its validity; nor any decision where any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under the United States, and where the decision was against the title, right, privilege or immunity specially set up by either party under such Constitution, treaty, statute, commission, or authority.

And the defendant in error, by its counsel as aforesaid, also moves the court to affirm the judgment or decree from which the said writ of error purports to have been taken; because, although the record in the above-entitled cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was taken for delay only.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for Defendant in Error
for the purposes of this motion.

NOTICE OF MOTION.

To Arthur Brown and H. P. Henderson, Esqrs.,
Of Counsel for the Plaintiffs in Error:

Take notice that on Monday, the 10th day of October, 1898, at the opening of court, or as soon thereafter as counsel can be heard, the foregoing motion will be submitted to the Supreme Court of the United States, for the decision of said court thereon. Annexed hereto is a copy of the brief of argument, to be submitted with the said motion, in support thereof.

JOS. K. McCAMMON,
JAMES H. HAYDEN,
Of Counsel for Defendant in Error
for the purposes of this motion.

PROOF OF SERVICE.

DISTRICT OF COLUMBIA, *ss :*

Robert C. Hayden being duly sworn, deposes and says: That he is above the age of twenty-one years; that on the 13th day of August, 1898, he deposited in the United States mail copies of the foregoing motion and notice and the brief hereunto annexed in a sealed wrapper, duly post-paid, directed to Arthur Brown and H. P. Henderson, Esquires, of Counsel for the Plaintiffs in Error, at Salt Lake City, Utah.

ROBERT C. HAYDEN.

Subscribed and sworn to before me this 13th day of August, 1898.

[SEAL.] EDWD. H. LEWIS,
Notary Public.

BRIEF IN SUPPORT OF THE MOTION TO DISMISS OR AFFIRM.

This was a suit to confirm and quiet the title to certain unsurveyed public lands of the United States situated in the county and State of Utah. It was brought on September 12, 1896, in the District Court of the Fourth Judicial District of Utah, by The Rio Grande Western Railway Company, a corporation of Utah, now defendant in error, against The Telluride Power Transmission Company, L. L. Nunn, and L. Holbrook (pp. 1–4).

The defendants below demurred to the bill of complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. No exception was taken by the defendants and they made answer (pp. 4–5).

By the answer, the defendant Holbrook disclaimed any

interest in the subject-matter of the suit, but denied the validity of the plaintiff's title. The defendants, The Telluride Co. and Nunn, objected to the State court's taking jurisdiction of the case, and denied the corporate existence and rights of the plaintiff and the plaintiff's right or title to the land in question, and asserted a right or title adverse to that of the plaintiff (pp. 5–12).

The cause was tried by the court, sitting without a jury (p. 24). Findings of fact and conclusions of law were filed by the court, and it entered judgment, whereby the plaintiff's right or title to the land in question was adjudged valid, and confirmed and quieted; the defendants' adverse claim was adjudged invalid; and the defendants were enjoined from setting up claims or exercising rights adverse to those of the plaintiff (pp. 13–22).

From the judgment of the District Court, the defendants The Telluride Co. and Nunn, took an appeal to the Supreme Court of Utah (pp. 23, 313–318). The appeal was heard by the Supreme Court and judgment entered affirming that of the District Court (p. 335).

The case comes before this court on a writ of error to the Supreme Court of Utah, sued out by the defendants, The Telluride Co. and Nunn (pp. 340–341).

These questions are now raised by the defendants (plaintiffs in error) (pp. 342–344):

I. Had the plaintiff (defendant in error) forfeited its charter from the State of Utah, or any of its corporate rights thereunder, by a failure to commence the construction of one of its lines and its failure to complete and put in operation all of its lines of railway specified in its charter, within the times prescribed by the statutes of Utah? (Par. 12, 13, and 14, p. 344).

II. Had the District Court of the Fourth Judicial District of Utah and the Supreme Court of Utah jurisdiction

to hear and adjudicate the cause, in view of certain proceedings taken by the defendants The Telluride Co. and Nunn (plaintiffs in error) looking to the removal of the cause to the Circuit Court of the United States? (Par. 10 and 11, p. 344).

III. Had the plaintiff (defendant in error) acquired the possession, the right of possession, or the inchoate title to the unsurveyed public land in question, subject to a condition subsequent, which may be performed at any time within a year after the Government survey? (Par. 3, 6, and 8; pp. 342–343).

IV. Had the defendants (plaintiffs in error) or either of them the possession of the land in dispute, prior to its appropriation by the plaintiff; or had they any right to hold it against the plaintiff? (Par. 1, 2, 3, 4, 5, 7, and 9, pp. 342–343.

I.

Had the plaintiff (defendant in error) forfeited its charter from the State of Utah, or any of its corporate rights thereunder, by a failure to commence the construction of one of its lines and its failure to complete and put in operation all of the line or lines of railway specified in its charter, within the times prescribed by the Statutes of Utah? (12, 13, *and* 14, p. 344).

It appears from the record that the plaintiff (defendant in error) was organized, in the State of Utah, on June 24, 1889, by the consolidation of the Denver & Rio Grande Western Railway Company, a corporation of Utah, and the Denver & State Line Railway Company of Colorado (pp. 13; 333–334).

The laws of Utah applicable to such an incorporation provide: (*Comp. L. Utah*, 1888, *Secs.* 2360–2363.)

SEC. 2360: "It shall be lawful for any railroad companies organized under the laws of this Territory to consolidate their capital stock, debts, property, assets and franchises with any railroad company or companies organized under the laws of any State or other Territory."

SEC. 2361: "Said consolidations shall be made under the conditions, provisions, restrictions, and with the powers hereinafter in this act mentioned, that is to say, the presidents or secretaries of the several corporations proposing to consolidate, may enter into a joint agreement under the corporate seal of each company for the consolidation of said several companies, and the prescribing terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number and names of the directors and officers thereof, and who shall be the first directors and officers and places of residence, the number of shares of capital stock, the principal place of business of the new company in each State or Territory traversed by the line of railway, and such other provisions as may be required by law to be inserted in an original certificate of incorporation, the manner of converting the capital stock of each of said companies into that of the new corporation, and how and when directors and other officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and consolidation of said companies; said agreement shall be authorized or ratified by the board of directors of each company consolidating, and shall be submitted to the stockholders of each of the said companies or corporations, at a meeting thereof called for the purpose of taking the same into consideration; . . . and the agreement so adopted, or a certified copy thereof, shall be filed in the office of the auditor of public accounts, and in the office of the secretary of this territory, and shall from thence be deemed and taken to be the agreement and act of consolidation of said companies, and a copy of said agreement and act of consolidation duly certified

by said auditor or by the secretary of the Territory, under his official seal, shall be evidence of the existence of said new corporation. . . . "

SEC. 2362: "Upon the making and perfecting of the said agreement and act of consolidation, as provided in the preceding sections, and filing the same as aforesaid, the several corporations parties thereto shall be deemed and taken to be one corporation, by the name provided in said agreement and act, possessing within this territory all the rights, privileges and franchises, and subject to all the restrictions, disabilities, duties and liabilities of each of such corporations so consolidated."

SEC. 2363: "Upon the consummation of said consolidation as aforesaid, all and singular the rights, privileges and franchises of each of said corporations parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account, as well as of stock, subscriptions and other things in action, belonging to each of such corporations, shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed, and all property, all rights of way, and all and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to said agreement; and the title to real estate, either by deed or otherwise under the laws of this territory, vested in either of such corporations, shall not be deemed to revert or be in any way impaired by reason of this act; and all debts, liabilities and duties of either of said companies shall henceforth attach to the said new corporation, and be enforced against it to the same extent as if said debts or liabilities had been incurred or contracted by it."

Thus the plaintiff derived its corporate rights wholly from the State of Utah. Its exercise of those rights within that State, including the right of existence, and that of constructing and operating its lines of railroad, is governed

wholly by the laws of Utah and it is amenable to those of no other sovereignty.

The provision relating to the forfeiture by such a corporation of its charter or corporate rights is this: (*Com. L. Utah* 1888, *Sec.* 2358:)

> "If such railway company shall not within two years after the filing of its original articles of association begin the construction of its road and expend thereon at least five per cent. of the amount of its capital stock and finish and put the same in full operation within ten years, its act of incorporation shall be void."

The defendants (plaintiffs in error) contended in both the District and Supreme Courts of Utah that, inasmuch as the plaintiffs did not commence the construction of the line through Provo Cañon within a period of two years after the filing of its articles of incorporation its right to construct that line had been forfeited; and furthermore that its act of incorporation had become void, on account of its failure to finish and put in full operation all of its lines within ten years after the incorporation of one of the parent companies, the Denver & Rio Grande Western Railway Co., which was organized on July 28, 1881 (pp. 27–29, 313–314). The Supreme Court decided otherwise; holding that the plaintiff was not required to begin the construction of each of its lines, within two years, and had complied with the law in beginning the construction of its other lines and expending thereon more than 5 per cent of the amount of its capital stock; and, that the law gave the plaintiff a period of ten years from the filing of its own articles of incorporation, in which to finish its road and put it in full operation (pp. 333–338). This period will extend to June 24, 1899 (p. 13).

No federal question can be evolved from this interpretation of the State law, applied to the existence, within the State, of a corporation created pursuant to State law.

Sec. 709 R. S. U. S.

II.

Had the District Court of the Fourth Judicial District of Utah and the Supreme Court of Utah jurisdiction to hear and adjudicate the case, in view of certain proceedings taken by the defendants The Telluride Co. and Nunn (plaintiffs in error) looking to the removal of the cause to the Circuit Court of the United States? (*Pars.* 10–11, *p.* 344.

By their answer the defendants, The Telluride Co. and Nunn, claimed that the District Court of Utah had no jurisdiction over them or the subject-matter of the cause, and reserved the right of moving the dismissal of the suit or its removal to the Circuit Court of the United States. The facts upon which the denial of jurisdiction was based were not pleaded (pp. 7–8).

It does not appear from the record sent up to the Supreme Court of Utah that the defendants made any attempt to avail themselves of any supposed rights thus reserved until the trial in the District Cour (pp. 24–27). At the outset of the trial statements were made by the counsel for both parties, from which it appears that the defendants, The Telluride Co. and Nunn, had taken some steps to secure the removal of the cause on the ground of a diversity of citizenship; but that it had been remanded to the State Court by the United States Court. No attempt appears to have been made by the defendants to have the action of the Circuit Court reviewed by this court or the Circuit Court of Appeals.

The trial in the State Court proceeded, the defendant objecting.

On appeal to the Supreme Court of Utah, the defendants, The Telluride Co. and Nunn, assigned forty-five particulars in which they asserted that the District Court had committed error. In none of these is mention made of any unlawful assumption of jurisdiction by the District Court; or of any proceedings had looking to the removal of the cause; or of any error of the District Court in proceeding to hear and adjudicate the case because of the concurrent or exclusive jurisdiction of the United States Court (pp. 313–318).

The question was neither raised in nor decided by the Supreme Court of Utah, whose final judgment herein was entered on *December* 7, 1897 (pp. 333–340).

Thereafter, on January 21, 1898, there were filed in the clerk's office of the Supreme Court of Utah certain manuscripts, certified by the clerk of the District Court to be copies of papers there on file. These were: A petition to the District Court of the Fourth Judicial District of Utah asking for the removal of the cause to the United States Circuit Court; a bond conditioned for the payment of costs of the removal proceedings; an order of the Circuit Court of the United States setting for hearing a motion of the defendants The Telluride Co. and Nunn, asking for the "transfer" of the cause; an order of the Circuit Court denying that motion; and an objection directed by the defendants' counsel to the District Court of Utah in which they protested against its proceeding further with the case—the last paper bears no date, and it is impossible to say, when it was introduced (pp. 329–333).

The plaintiffs in error now contend that "the *District Court* erred in proceeding to try the case and take jurisdiction thereof, after a motion had been made, which appears in

the record, to remove said cause and all proceedings subsequent to the filing of the petition and bond for removal were null, void and without jurisdiction." (Par. 10, p. 344).

While we maintain that the defendants were not entitled to remove the cause to the United States court; that their petition did not recite facts essential to the establishment of their right of removal, but merely made averments of law; and that the action of the State Court would not have been stayed, pending a decision of the Federal Court as to the right of removal (National Union Bank *v.* Dodge, 11 American Reporter, 641); it does not seem necessary to argue those matters here.

It is the judgment of the *District Court* and not that of the Supreme Court of the State of which the plaintiffs in error complain. In many decisions this court has held that its appellate jurisdiction over the judgments of State courts is limited by statute (Sec. 709, R. S. U. S.) to those of the highest courts of the several States. It cannot review the judgment of the District Court.

McComb, Exr. v. *Commrs. of Knox Co.*, 91 *U. S.* 1.

The plaintiffs in error also contend that the Supreme Court of Utah erred in proceeding to hear and determine the cause and confirm the judgment of the District Court, after their objection made to the jurisdiction of the State Court; and in rendering a judgment in the case after the filing of their petition and bond for removal. (Par. 11, p. 344).

We have seen that the record before the Supreme Court of Utah, when it heard this case and entered its final judgment herein, contained nothing to show that the defendants (plaintiffs in error) had removed, or made petition for the removal of the cause. They wholly neglected to raise the question in the Supreme Court, and

it was not decided. For the purposes of this writ of error, the record stopped with that of the final judgment. The papers filed subsequent thereto cannot be considered by this court. The judgment of the Supreme Court cannot be reviewed on a question that was never before it and one that it did not decide.

Such was the ruling of this court in the case of *Goodenough Horse Shoe Mfg. Co.* v. *Rhode Island Horse Shoe Co.*, 154 *U. S.* 635. The court said:

> "The Rhode Island Horse Shoe Co., a citizen of Rhode Island, sued the Goodenough Horse Shoe Co., a citizen of New York, in the Supreme Court of the State of New York, to recover the amount alleged to be due upon an account for goods sold. Summons was served September 14, 1876, and on October 5, 1876, judgment was entered against the defendant upon default, in accordance with law and the practice of the court in such cases. The record of the judgment, as sent here, shows this state of facts and nothing more. On the 9th of October the defendant moved the court to vacate the judgment, and in support of that motion produced affidavits tending to prove that on the 3d of October it had filed its petition for the removal of the cause to the Circuit Court of the United States. No effort was made, however, to correct the record as it stood so as to disclose this fact. This motion being denied the defendant below sued out this writ of error which the plaintiff now moves to dismiss for want of jurisdiction.
>
> "We can only re-examine the final judgment in the suit, and for that purpose must look alone to the record of that judgment as it is sent to us. . . .
>
> "In this case the judgment was rendered October 5, and the record of the *judgment* stopped then. What took place afterwards was nothing more than an attempt to avoid the judgment. The facts which it is claimed give us jurisdiction appear only in the record

of this subsequent proceeding, over which we have no supervision. . . . Until the record of the judgment we are called upon to examine discloses the question necessary to give us jurisdiction, we cannot proceed. The motion to dismiss for want of jurisdiction is granted."

In the case of *Morrison* v. *Watson*, 154 *U. S.* 111–115, it was held that in order to give this court jurisdiction of a writ of error to review the judgment of the highest court of a State, a right giving rise to a federal question must be claimed before judgment, *in that court;* otherwise it cannot be asserted in this court.

See also:

Spies v. *Illinois*, 123 *U. S.* 131–181.
Brooks v. *Missouri*, 124 *U. S.* 394.
French v. *Hopkins*, 124 *U. S.* 524.
Chappell v. *Bradshaw*, 128 *U. S.* 132–134.
Texas Pacific Rwy. v. *Southern Pacific Co.*, 137 *U. S.* 48–53.
Brown v. *Massachusetts*, 144 *U. S.* 573.
Schuyler National Bank v. *Bollong*, 150 *U. S.* 85.
Miller v. *Texas*, 153 *U. S.* 535.
W. & St. P. Land Co. v. *Minnesota*, 159 *U. S.* 540–541.

III.

Had the plaintiff (defendant in error) acquired the possession, the right of possession, or the inchoate title to the unsurveyed public land in question, subject to a condition subsequent, which may be performed at any time within a year after the Government survey? (Pars. 3, 6, and 8, pp. 342–343).

Upon its organization, as related in the first section of

this argument, the plaintiff (defendant in error) became entitled to construct and operate in Utah certain lines of railway; among others, one from the city of Provo in the county and State of Utah, to a point on the eastern boundary of the State, passing through the counties of Uintah, Wasatch, and Utah (12, p. 324); and a line from a point at or near the city of Provo to a point at or near the mouth of the Duchesne Fork of the Uintah river, passing into and through the counties of Utah, Wasatch, and Summit (15, p. 326).

The only feasible route for a railroad between the termini of either of these lines lay through Provo Cañon. Another line would involve the crossing of the Wasatch range of mountains and its construction and operation would be involved in great difficulty and expense.

Soon after its organization, the plaintiff filed with the Secretary of the Interior at Washington, D. C., a copy of its articles of incorporation and proofs of its organization under the same. These papers bear this endorsement:

> "DEPARTMENT OF THE INTERIOR,
> "*May* 27, 1890.
>
> "Respectfully returned to the Commissioner of the General Land Office for filing. The papers are in proper form and satisfactory to the Department, and the Commissoner will so inform the Company.
>
> "GEORGE CHANDLER,
> "*First Assistant Secretary*" (*p.* 29).

On or about March 5, 1896, a survey of its proposed line was made through Provo Cañon. The plaintiff appropriated and took for its track and right of way and other railroad purposes certain lands, including a strip 200 feet in width, or 100 feet on each side of its surveyed line, commencing above a point called Hanging Rock and ex-

tending up the cañon for a distance of about 3,500 feet. The right or title to this strip forms the subject-matter of the case at bar. It is admitted that this land and all other land in the Provo Cañon is unsurveyed public land of the United States. On March 23, 1896, the plaintiff commenced the final location of the line and proceeded with such location to the mouth of Provo Cañon and through it. The work was prosecuted diligently and in good faith, with the intention of immediately constructing a railroad through the cañon. In June of 1896 contracts were made for the construction of the roadbed and the grading of it was begun (p. 14).

About July 1, 1896, a change of alignment was adopted. The line was transferred from the north to the south side of the Provo river for a short distance, which caused it to traverse the land in dispute. Shortly after this change the work upon the roadbed reached this land, and those employed in grading attempted to proceed with their work. Here they were stopped and driven from the land by the defendants (plaintiffs in error) or their agents, who made claim not only to the land in dispute, but to the whole of the cañon, above Hanging Rock, and to much of it below (pp. 14–15).

Thereupon this suit was brought with the result already stated.

The plaintiff (defendant in error) located its right of way pursuant to the first section of the act of Congress approved March 3, 1875, which provides (*inter alia*) (18 *U. S. Stat. L., p.* 482):

> "That the right of way through public lands is hereby granted to any railroad company, duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior

> a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road."

Upon the filing and approval of its articles of incorporation and proofs of its organization, by the Secretary of the Interior as related, the plaintiff (defendant in error) forthwith, became entitled to proceed under this act.

The District Court held that the plaintiff (defendant in error) had acquired the right to construct a railroad over the land in dispute, and prior to the commencement of this suit, had the possession, right of possession and inchoate title to that land, subject to a condition subsequent; and that the plaintiff was entitled to judgment quieting and confirming its possession and right to the possession of the said land. (Pp. 20–21).

On appeal, in the Supreme Court of Utah, the defendants (plaintiffs in error) contended that this was error, on the ground that the plaintiff (defendant in error) could not acquire any rights under the act of March 3, 1895, prior to the filing with the Register of the proper land office (U. S.) a profile of its road. They relied upon the fourth section of this act, which provides:

> "That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed land, and if upon unsurveyed land, within twelve months after the survey thereof by the United States, file with the Register of the Land Office for the district where such land is located, a profile of its road, and upon approval thereof by the Secretary of the Interior, the same shall be entered upon the plats of said office. And thereafter all such lands, over which such right of way shall pass, shall be disposed of, subject to such right of way." (18 *U. S. Stat. L., p.* 482.)

In its opinion the court said (p. 339):

> "If the land had been surveyed, the plaintiff would have had twelve months after the survey, within which to make the location, but it being unsurveyed, it will have twelve months after the same is surveyed by the Government, within which to file with the Register of the proper Land Office, a profile of its road."

The defendants (plaintiffs in error) make the same contention here that they made in the Supreme Court of Utah. (Pars. 3, 6, and 8, pp. 342–343.) We submit that by its compliance with the requirement of the first section of the act of 1875 the plaintiff (defendant in error) acquired a present grant of all rights of way, described in its articles of incorporation. Prior to the survey of its line, the grant remained what is termed in the decisions of the Land Office a "float." But the survey of the line and work done upon the roadbed fixed the grant and vested the title in the railway company.

Denver & R. G. Ry. Co. v. *Alling*, 99 U. S. 463.
Dakota Central R.R. Co. v. *Downey*, 8 *Land Dec.* 115.

It is admitted that the land in dispute is unsurveyed. The Government has never made it possible for the plaintiff (defendant in error) to file a profile of its road. Even if the location and partial construction of the road did not dispense with the necessity of filing a profile after survey, that requirement would operate as a condition subsequent, to be performed when the Government makes its performance possible. Meanwhile the railroad would be entitled to protection in the possession and appropriate use of its line, subject to no superior title save that of the United States.

In no event, however, can this Court review the judgment of the court below so far as it relates to the act of 1875 (*supra*) or the right and title of the plaintiff (defendant in error) acquired thereunder, because the decision of the court below was not *against* the validity of that act nor *against* the validity of the title, right, privilege, or immunity claimed by the plaintiff (defendant in error). Both were held to be valid.

In the case of *Clark* v. *Commonwealth of Pennsylvania*, 128 *U. S.* 395–397, the court said:

> "It is essential that the record should disclose not only that the alleged right, privilege, or immunity was specially set up and claimed in the court below, but that the decision of that court was *against* the right so set up or claimed."

In the case of *Texas & Pacific Railway* v. *Johnson*, 151 *U. S.* 81–98, it was said:

> "Because the suit might have been brought in the Circuit Court of the United States, or removed thereto from the State Court on the ground that it was one arising under the laws of the United States . . . it does not follow that the State Court decided *against* any title, right, privilege, or immunity in exercising its jurisdiction."

See also—

Murdock v. *Memphis*, 20 *Wall.* 590–626.
Detroit City Railway Co. v. *Guthard*, 114 *U. S.* 133.
Spies v. *Illinois*, 123 *U. S.* 131–181.
Jurisdiction of the U. S. Courts (*B. R. Curtis*), *p.* 32, *note* 1.

IV.

Had the defendants (plaintiffs in error) or either of them the possession of the land in dispute, prior to its appropriation by the plaintiff; or had they any right to hold it against the plaintiff? (*Pars.* 1, 2, 3, 4, 5, 7 *and* 9, *pp.* 342–343).

On October 5, 1894, the defendant Holbrook posted a notice in Provo Cañon, at a point called Bridal Veil Falls, which is some 5,400 feet below the lowermost part of the land in dispute (p. 16). By the notice, he claimed, in a general way, the right to take water from the Provo river at or near the point where the notice was posted, and convey it down the cañon by means of a suitable dam, flume and pipe line to a power station to be built near the said river, and to use the water for the purpose of generating electric current, to furnish light and power, and for other beneficial purposes. The notice is recorded in the county records of Utah County (p. 16).

Some brush was cut in the vicinity of this notice during the fall of 1894, and a line of levels was run from a point near the notice, downstream to a place chosen for the site of the proposed power station (p. 16).

As early as May of 1895, Holbrook and the other defendants abandoned the idea of taking water from the river near Bridal Veil Falls, and none of the work, described in the notice, was done (p. 16).

In May of 1895 a representative of the defendants The Telluride Co. and Nunn selected a point on the river, known as Middle Rock, at which to divert water. This was about 3,700 feet higher upstream than Holbrook's notice and 1,700 feet below the lowermost part of the land in dispute (p. 16). In the autumn of 1895, the same representative

ran three level lines through part of the cañon, 15, 30 and 60 feet, respectively, above the surface of the river. The 15 foot contour intersected the top of a stake, at Middle Rock, marked "top of dam." Later, brush was cut along the 15-foot contour and preparation was made for the construction of a dam, 15 feet high, and a reservoir. On March 24, 1896, a surveyor representing the defendants The Telluride Co. and Nunn went on the ground and began a preliminary survey of the bed of a flume to conduct water from the 15-foot level at Middle Rock (pp. 16–17).

On March 27, three weeks after the plaintiff (defendant in error) had surveyed its line and appropriated the land in dispute, for its railway, as above related, the same surveyor, in the name of the defendant Nunn, posted a notice at Middle Rock on the 60-foot level line. By this notice Nunn made claim to all lands in the cañon below the 60-foot level, commencing at Middle Rock, and extending thence, upstream, indefinitely; such lands to be overflowed by a reservoir formed by the construction of a dam at Middle Rock of sufficient height to raise the water of the stream to the 60-foot level. Nunn further stated it to be his intention to use the water for agricultural and manufacturing purposes, conducting it from Middle Rock to the mouth of Provo Cañon, and thence to the benches of the Utah Valley. The notice was not recorded (p. 17).

None of the work specified in this notice was taken up systematically, and about April 20 even the cutting of brush and other intermittent work then in progress was stopped, by direction of Nunn, who said that the posting of the notice was a mistake and that he intended to locate a dam at a point on the river called Hanging Rock, and there to build a dam which would raise the water to a height of 85 feet above its natural level (p. 17). Hanging Rock is near the lowermost part of the land in dispute, and is 1,700 feet higher upstream than Middle Rock (p. 16).

Between April 25, 1896, and June 5, 1896, a surveyor representing The Telluride Co. and Nunn completed a rough survey of the 85-foot contour above Hanging Rock. Some stakes were driven along the line, but no notice was posted in the names of the defendants, or of either of them, by which a claim was asserted to the land included within this contour. No water was ever diverted from the river at Hanging Rock and no work was ever done at that point, other than the sinking of two small pits for the purpose of discovering bed rock (pp. 17–18).

In the summer of 1896, the defendants completed the grading for their flume intended to conduct water from a 15-foot reservoir at Middle Rock and constructed the flume down the cañon from that point (p. 18).

A dam which would raise the water 85 feet above its natural level at Hanging Rock, would cause the overflow of the land in dispute and all other land in the cañon above Hanging Rock, which could be used for railroad purposes. It would also overflow a county road running through the cañon, close to the river, which has been in use ever since the region was settled by white men. In short, it would exclude from the cañon every enterprise and interest, both public and private, except that of the defendants the Telluride Co. and Nunn, and in the case of rail or wagon roads this would involve the ascent and crossing of the Wasatch Mountains at a greatly increased cost, for construction, maintenance and operation (pp. 19–20).

A 15-foot dam at Middle Rock would retain and store a quantity of water adequate to the capacity of the defendants' flume. This water would be capable of developing at least 4,400 horse-power, an amount more than sufficient to supply all the needs of the surrounding country. At the same time such a dam would not cause the overflow of the land in dispute, or any other part of the railway com-

pany's line; nor would it destroy the county road or exclude other interests and enterprises from the cañon (pp. 18–19).

By the joint answer of the three defendants (plaintiffs in error and Holbrook), the latter disclaimed any interest in the land in dispute. He did not join in the appeal to the Supreme Court of Utah, nor was he joined in this writ of error (pp. 7 and 19).

So far as it related to the right or title of the defendants the Telluride Co. and Nunn to the land in dispute, the answer alleged (pp. 8–12):

> That in 1894, they entered upon Provo Cañon and made surveys for the purpose of ascertaining whether water power could be obtained for the production of electric current and whether by storage in reservoirs water could be obtained for agricultural and mining purposes; and that thereafter they took possession of a large part of the public domain, lying in the said cañon, including the land in dispute, for the purpose of constructing a reservoir thereon; that in order to complete this enterprise they would require the whole of the cañon, and that if the plaintiff or anyone else should construct a railroad through the cañon, this enterprise would be defeated; that in 1895 they began the construction of a flume, in order to obtain power with which to aid in the construction of a dam 85 feet high at Hanging Rock the latter dam being intended to retain water for power and irrigation purposes; that they made surveys of the contour of the reservoir to be formed by the dam; that in the spring of 1896 they prosecuted the work upon the said surveys and flume; that prior to the plaintiff's entry into Provo Cañon, they, the defendants the Telluride Co. and Nunn, had entered upon the unoccupied, unsurveyed public land therein, with the purpose of constructing an expensive dam and reservoir; and that, on September 12, 1896, when this suit was commenced,

and for more than two years prior thereto, they were and had been in actual possession of the land in dispute.

After trial, the District Court found that none of the defendants had ever given public notice of an intention to erect a dam 85 feet high at Hanging Rock, or ever pursued with diligence any work, tending to show or give constructive notice of such an intention; that the defendants had never taken or had possession of the land in dispute or any land in the cañon, except that on which their flume was built and perhaps constructive possession of that which would be overflowed by the construction of a dam 15 feet high at Middle Rock; that the defendants actually intended to divert water from the river at Middle Rock by means of a dam not more than 15 feet high, and make present use of the power generated thereby, and intended at the same time, by the constant assertion of an intention to build larger dams, to keep control of the entire water power of the river, pending a possible increase of demand for it, and to exclude from the cañon, at their pleasure, all roads, railroads and other enterprises, both public and private. Further, the court found that, inasmuch as the construction of a dam 85 feet high at Hanging Rock would flood the county road mentioned above and the plaintiff's railway, and prevent them from going through the cañon at all, and would overflow the whole cañon for four miles above Hanging Rock, thus thwarting and hampering other interests and enterprises of a public or private character, such a dam, or in fact any dam, higher than 15 feet, would be unreasonable, unnecessary, and not in accordance with the customs and conditions of the country (pp. 17–20).

On appeal, in the Supreme Court of Utah, the Telluride Co. and Nunn contended that the District Court erred in

considering what would be the effect of the proposed 85-foot dam upon the county road, and whether or not such a dam would be reasonable, necessary, and in accordance with the customs and conditions of the country (par. 27, p. 315), and erred in holding that they never had title to the land in dispute, or the possession thereof, or any vested right therein, acquired in accordance with the laws and customs of the country (p. 20). They further complained that the District Court erred in its judgment (p. 22), whereby it enjoined the defendants and each of them from hindering or obstructing the plaintiff in the construction or operation of its railroad upon the line, surveyed over the said land. (Pars. 30–32, p. 315).

By none of these specifications of error, nor by any pleading or proceeding of record in the case, when it came before the Supreme Court of Utah did the defendants (plaintiffs in error) specially set up and claim that they had acquired title to the land in dispute, or any right thereto, under the Constitution or a statute or treaty of the United States, or by virtue of a commission held or an authority exercised thereunder. In a general way they claimed that their notices and surveys in the cañon, and the work done by them at or below Middle Rock, put them in possession of the said land. There is nothing of record to show whether they claimed title under the general law of real property, or under a law of the State of Utah (*Compiled Laws of Utah*, 1888, *Sec.* 422, *Vol. I*, *p.* 216) or under Sec. 2339, R. S., U. S. The State and federal statutes on the subject which are identical provide that:

> "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested or accrued, and the same are recognized or acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners

of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed, but whenever any person, in the construction of any ditch or canal injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

Either statute might have been relied upon. Hence no right or title was specially set up by the Telluride Co. and Nunn in the Supreme Court of Utah, the denial of which by that court could give rise to a federal question here. (R. S. U. S., Sec. 709).

Brown v. Colorado, 106 *U. S.* 95 (96–97). This was a writ of error to reverse the judgment of the Supreme Court of Colorado, rendered in a suit in ejectment. In the District Court, the State, to make out its title, offered in evidence a deed from Brown to the Territory of Colorado. To its introduction, objection was made, on the ground, among others, "that the Territory of Colorado had no right to take a conveyance of real estate at the time of the making of the deed without the consent of the Government of the United States." This objection was overruled and an exception taken. Judgment was entered in favor of the State. On appeal by Brown to the Supreme Court of Colorado, one of the assignments of error was to the effect that the District Court erred in receiving the deed in evidence. As the judgment of the District Court was affirmed, this assignment of error must have been overruled. On writ of error, it was claimed that the judgment of the Supreme Court of the State was reviewable by the Supreme Court of the United States. The defendant in error moved to dismiss the writ. Held:

"It certainly does not appear that in this case the court below decided against the validity of any treaty, statute, or authority of the United States, or in favor of any statute or authority of a State claimed to be repugnant to the Constitution, treaties, or laws of the United States. All the plaintiff in error insisted upon below, was that the Territory of Colorado could not take a conveyance of real property without the consent of the Government of the United States, but whether this disability grew out of a statute of the United States or of the territory is not stated. . . . The record furnishes no indication that any statute of the United States was brought to the attention of the court below, and a ruling asked upon it in connection with the objection which was made to the admission of the deed. No judge in deciding upon the objection as it was made and presented, would be likely to suppose that if he admitted the evidence, he would deny any 'right, title, privilege, or immunity,' 'set up or claimed' under a statute of the United States. Certainly, if the judgments of the courts of States are to be reviewed here for decisions upon such questions, it should be only when it appears unmistakably that the court either knew or ought to have known that such question was involved in the decision to be made. The rule was stated by Mr. Justice Miller in *Bridge Proprietors* v. *Hoboken Co.*, 1 *Wall.* 116, thus: 'The court must be able to see clearly from the whole record that a certain provision in the Constitution or act of Congress was relied upon by the party who brings the writ of error, and that the right claimed by him was denied.' "

Kansas Endowment Assoc. v. *Kansas*, 120 *U. S.* 103. This was a suit begun in one of the District Courts of Kansas to procure the forfeiture of the charter of the Kansas Endowment Association, because of its failure to comply with the requirements of a State statute. Judgment was given against the defendant. In support of its motion for

a new trial, the defendant assigned, among other reasons, this: "1. That said chap. 131 (Laws of Kansas of 1885), is unconstitutional and void." The defendant carried the case to the Supreme Court of the State, on a petition in error, and there contended that the District Court erred, in overruling the motion of the defendant below for a new trial. The Supreme Court affirmed the judgment of the District Court and the case was brought before this court on a writ of error. The defendant in error moved to dismiss the writ. Held:

> "From this statement it is clear that we have no jurisdiction, as no federal question appears on the face of the record. It is true that in the motion for a new trial, the question of the constitutionality of chapter 131 of the act of 1885 is presented, but that is not enough, since it is nowhere that any provision in the Constitution of the United States is relied on. The suggestion in the motion applies as well to the constitution of the State as to that of the United States and it has long been settled that we have no jurisdiction unless it distinctly appears that a question under the Constitution or a law of the United States, not only might have been, but actually was raised and decided. Here is nothing of the kind and in the assignment of errors on the petition in error to the Supreme Court of the State, no reference was made to any constitutional question whatever, except inferentially under that which relates to the overruling of the motion for a new trial. Certainly it does not appear unmistakably on the face of the record that the Supreme Court of the State either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnancy to the Constitution or laws of the United States."

See also—

Spies v. *Illinois*, 123 *U. S.* 131 (181).
Chappel v. *Bradshaw*, 128 *U. S.* 132 (133–134).
San Francisco v. *Itsall*, 133 *U. S.* 65 (66–67).
Brown v. *Massachusetts*, 144 *U. S.* 573 (579).
Schuyler Nat. Bk. v. *Bollong*, 150 *U. S.* 85 (87–88.)
Powell v. *Brunswick Co.*, 150 *U. S.* 433 (439–440).
Miller v. *Texas*, 153 *U. S.* 535 (537–538).
Morrison v. *Watson*, 154 *U. S.* 111 (115).
Sayward v. *Denny*, 158 *U. S.* 180 (183–184).
Winonah & St. Peter Land Co. v. *Minnesota*, 159 *U. S.* 540 (541).

In their petition for the writ of error, now before this court, the plaintiffs in error alleged that in the final judgment of the *District Court*, there was drawn in question the validity of an authority exercised by them under Sec. 2339 R. S. U. S., and a decision was had against the validity of such authority (pp. 340–341). This is the first affirmative claim made by the Telluride Co. and Nunn or either of them of any right acquired pursuant to a statute of the United States or an authority, exercised thereunder. It comes too late, after the entry of final judgment.

Goodenough Horse Shoe Co. v. *Rhode Island Horse Shoe Co.*, 154 *U. S.* 635.
Morrison v *Watson*, 154 *U. S.* 111 (115).
Manning v. *French*, 133 *U. S.* 186.
Winonah & St. Peter Land Co. v. *Minnesota* (*supra*).

Again, this court cannot review the judgment of the District Court because it is not that of the highest court of the State.

McCombe Exr. v. *Commrs. of Knox Co.*, 91 *U. S.* 1.

By their assignments of error filed in this court, the Telluride Co. and Nunn contend that the Supreme Court of Utah erred in holding:

> That they did not have a right to construct a dam 85 feet high or other proper height for the purpose of generating water power with which to transmit electrical power (1, p. 342), that their right to erect a dam for that purpose was not prior and paramount to that of the plaintiff below to build a railroad; (2 p. 342) that their possession of the land in question was not prior to that of the plaintiff (3 pp. 342–343); that a dam raising the water 85 feet at Hanging Rock would flow the county road at a depth ranging from 70 feet to 1 foot and the expense of carrying the said road above the dam and its reservoir on the side of the mountain would be great, amounting to many thousands of dollars (4 p. 343); that a dam which would raise the water 85 feet above its natural level at Hanging Rock, or any dam higher than 15 feet, would, under all the circumstances surrounding the case, be unreasonable, unnecessary and not in accordance with the custom or conditions of the country and would impair and thwart other interests and enterprises of a public character and that a higher dam in the river bottom would be unnecessary in an adjustment of the relative rights and interests of the parties to this suit and the public, (5 p. 343); that the defendants never had the title, possession or right of possession to the land in dispute, or any part thereof, and had not acquired any vested right therein in accordance with laws or customs of the country, or any right to flow or otherwise occupy the land in dispute or any part thereof, or to prevent the use and occupation thereof for railroad purposes, and the claim of the defendants to the said land is unfounded and invalid (7 and 9, p. 343); that the plaintiff below was entitled to judgment quieting and confirming its possession and right to the possession of the land in dispute as

against the defendants, and enjoining the defendants from interfering with the plaintiff or interrupting it in the use and occupation of the said land and from hindering and obstructing the plaintiff in the construction and operation of a railroad thereon and thereover; and enjoining the defendants and each of them from erecting a dam in Provo Cañon at any point or place which would cause the overflow of the railroad to be constructed by the plaintiff on the grade of its existing survey (8, p. 343).

Each question thus raised by the plaintiffs in error, might have been considered and decided under the general laws of real property, or the State statute (Comp. Laws Utah, 1888, Sec. 422), as well as under the statute of the United States (R. S. U. S. § 2339). There is nothing to show that the federal statute was relied upon, and in consequence, no federal question is presented. We need not again refer to the authorities upon this point, which have just been cited.

Again, although the Supreme Court of Utah affirmed the judgment of the District Court, and therefore, in a technical sense, overruled all of the assignments of error which were set up by The Telluride Co. and Nunn, on appeal from the judgment of the District Court; it is now the practice of the Supreme Court of the United States to ascertain from the opinion of the appellate court of the State, the grounds on which it actually based its judgment.

In its opinion, herein, the Supreme Court of Utah said (pp. 339–345):

> "We have no doubt that the defendants might have obtained a vested right to any unappropriated waters of the Provo river, for the purpose of operating machinery, for irrigation or other useful purposes. Such right is recognized by the *laws and decisions of this State, and Sec.* 2339 *of the Revised Statutes of the*

United States declares that 'Whenever by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes have accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed.' . . . While no mention of dams or reservoirs is made in the law, we are of the opinion that so far as they may be necessary to the reasonable appropriation and use of such waters, they may be constructed; but as to whether such dams might be raised to the height of 85, 60 or even a less number of feet, we do not deem it necessary in this case to express an opinion. . . . It appears that the defendants' dam (at Middle Rock) to the height of 15 feet does not interfere with the use of the highway in the cañon, or with the occupancy or use of the cañon for any other legitimate purpose. We are unable to find from a preponderance of the evidence in the record that the defendants or either of them was in actual possession of it when the plaintiff located its right of way, took actual possession and engaged in grading it. We cannot regard the plaintiff as a mere intruder on the defendants' possessions, nor can we hold that they had a right to prevent the plaintiff's employes from grading it and to eject the plaintiff from actual possession. It is true the defendants had surveyed for dams and reservoirs at different points on the river, but they had not taken and did not hold actual possession of the land in dispute. . . . The decree of the court below is affirmed."

Thus we see that the Supreme Court of Utah did not deny, but upheld, the right of the plaintiffs in error to appropriate waters of the Provo river, so far as that right had been vested in them by priority of possession. It did

not deny, but uphold, their right to construct such dams and reservoirs as might be found reasonable and necessary in the exercise of a vested right to appropriate and use the water. It did not decide whether any particular dam and reservoir would or would not be reasonable and necessary. The decision of the case, so far as it related to the defendants' (plaintiffs' in error) claim of title, turned upon the question of possession. The court found as a fact after a review of the evidence, that neither the Telluride Co. and Nunn, nor either of them, had appropriated the land in dispute, or had possession of it, when the defendant in error located its right of way and took actual possession of the land by proceeding to grade its roadbed. This finding of fact effectually disposes of the case.

Booth v. *Tierman*, 109 *U. S.* 205 (256). It would dispose of the case, even if a federal question had been raised and decided against the plaintiffs in error.

In *Eustis* v. *Bolles*, 150 *U. S.* 361 (366), the Court said: "Where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

Dessaussure v. *Gaillard*, 127 *U. S.* 216 (234).
Hale v. *Ackers*, 132 *U. S.* 554 (564–565).
Johnson v. *Risk*, 137 *U. S.* 300 (309).
Sherman v. *Grinnell*, 144 *U. S.* 198 (202).
O'Neill v. *Vermont*, 144 *U. S.* 323 (336).

We submit (1) that this court has no jurisdiction of this writ of error, and that it should be dismissed; (2) that even

if this court could take jurisdiction, the judgment of the Supreme Court of Utah was right and should be affirmed, because the only result of the further prosecution of this writ of error would be to delay a settlement of the matter in controversy and enable the plaintiffs in error to pursue their policy of preventing all enterprises, both public and private, from making appropriate and lawful use of the Provo Cañon.

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